

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

MONIQUE GRIMES, as Personal
Representative of the Estate of
Damon Grimes, deceased,

Plaintiff,

v

TROOPER MARK BESSNER,
and TROOPER ETHAN
BERGER,

Defendants.

No. 2:17-cv-12860

Consolidated with No. 2:17-cv-13580

HON. GERSHWIN A. DRAIN

MAG. ELIZABETH A. STAFFORD

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James J. Harrington IV (P65351)
Gina U. Puzzuoli (P37992)
Danielle L. Dezbor (P79488)
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**MOTION TO WITHDRAW
AS DEFENDANT BERGER'S COUNSEL**

For the reasons stated in the accompanying brief, Assistant
Attorneys General Mark E. Donnelly and John G. Fedynsky, as well as
former Assistant Attorney General Joseph T. Froehlich, move to

withdraw as counsel for Defendant Ethan Berger in this matter.

Defendant Berger has been advised of this request for relief, and a copy of the motion and brief in support will be served on him.

Respectfully submitted,

/s/ John G. Fedynsky
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Dated: May 2, 2018

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EASTERN DISTRICT OF MICHIGAN

MONIQUE GRIMES, as Personal
Representative of the Estate of
Damon Grimes, deceased,

Plaintiff,

v

TROOPER MARK BESSNER,
and TROOPER JOHN DOE,
Individually,

Defendants.

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**BRIEF IN SUPPORT OF MOTION TO WITHDRAW
AS DEFENDANT BERGER'S COUNSEL**

CONCISE STATEMENT OF ISSUE PRESENTED

1. Should this Court grant this motion to withdraw as counsel?

STATEMENT OF FACTS

Undersigned counsel first appeared for Defendant Ethan Berger in this matter on December 28, 2017. At that time, the case was temporarily stayed pending determination of related criminal charges against the individual defendants. Counsel moved to extend the stay, to consolidate E.D. Mich. Case Nos. 17-12680 and 17-13580, and for more time to respond to the complaint on behalf of Berger.¹ Counsel advised Defendant Berger that the involvement of the Department of Attorney General was provisional. At the scheduling conference on March 27, 2018, counsel also informed the Court and Plaintiff's counsel that the involvement of the Department of Attorney General was provisional and subject to a future determination whether other counsel would be provided (which would mean a substitution of counsel) or no other counsel would be provided (which would mean a motion to withdraw).

¹ The Court declined to extend the stay, granted consolidation, and extended Berger's response date to February 20, 2018. (E.D. Mich. No. 17-13580, R. 13 & 15; E.D. Mich. No. 17-12860, R. 47.) Counsel filed Berger's answer on February 20, 2018. (E.D. Mich. No. 17-13580, R. 14.)

Pursuant to the collective bargaining agreement and applicable civil service rules, the Michigan State Police (MSP) requested representation for Berger while he was suspended pending investigation. Under applicable MSP policy, the internal affairs investigation could not proceed until after the Wayne County Prosecutor made charging decisions. On December 19, 2017, Prosecutor Kim Worthy announced homicide charges against Defendant Mark Bessner. She also announced no criminal charges were being filed against Berger for his role as driver of the pursuit police vehicle.

In short order, MSP initiated its internal affairs investigation of Berger. In late February, he received a notice of administrative interview set for March 2, 2018. Berger was interviewed and received a statement of charges and proposed discipline on March 20, 2018. MSP determined that Berger committed misconduct related to this case and terminated his employment on March 29, 2018. Berger has grieved this decision, which is the subject of pending arbitration proceedings.

On April 30, 2018, MSP advised Berger that it would no longer provide for his legal representation in this case and requested that the Department of Attorney General cease representing him. Berger has

also grieved this decision, which is also now the subject of pending arbitration proceedings.

DISCUSSION

Under the local rules, an attorney's appearance continues until final resolution of all claims by or against the party represented, or until a withdrawal or substitution order. E.D. Mich. LR 83.25(b)(1). "An attorney may withdraw or be substituted for only on order of the Court." E.D. Mich. LR 83.25(b)(2). The local rules also state that the Rules of Professional Conduct adopted by the Michigan Supreme Court apply to members of the bar who appear in the Eastern District of Michigan. E.D. Mich. LR 83.22(b). Those rules permit an attorney to withdraw from representation of a client if "good cause for withdrawal exists." Mich. R. Prof. Conduct 1.16(b)(6). Accordingly, this Court should apply its local rules and the state bar rules in tandem to decide this motion to withdraw. *See Brandon v. Blech*, 560 F.3d 536 (6th Cir. 2009) (applying Kentucky rules).

Good cause exists here for several reasons. Berger, the Court, and Plaintiff's counsel were informed from the outset that the involvement of the Department of Attorney General in this matter was provisional.

Continued involvement depended upon MSP concluding its investigation and determining Berger's employment and representation status. Those determinations were made, adverse to Berger, and consistent with applicable civil service rules and collective bargaining provisions. Berger's pending arbitrations are for another forum to decide. The complaint has been answered, initial discovery has been exchanged, and the parties are scheduled for an early facilitation on May 22, 2018.²

Under the circumstances, the Court in its discretion should grant the request to withdraw as counsel.³ Any prejudice to Berger or Plaintiff may be addressed separately by the Court in a modified scheduling order, or otherwise. Counsel will take all reasonable transition steps upon termination of representation. Mich. R. Prof. Conduct 1.16(d).

² On behalf of MSP, the Department of Attorney General intends to participate in the early facilitation.

³ Additionally, former AAG Joseph Froehlich has left employment with the Department of General and should be permitted to withdraw from this matter on that alternative basis.

CONCLUSION AND RELIEF REQUESTED

Counsel respectfully request that the Court grant this motion to withdraw, and grant any other appropriate relief.

Respectfully submitted,

/s/ John G. Fedynsky

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Dated: May 2, 2018

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on May 2, 2018, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record. Additionally, counsel sent a copy of this motion and brief to Defendant Ethan Berger via first-class mail and via electronic mail.

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